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In the Supreme Court of the United States

OCTOBER TERM, 1957

STATE OF GEORGIA, WESTERN AND ATLANTIC RAILROAD AND LOUISVILLE AND NASHVILLE RAILROAD COMPANY, APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION TO AFFIRM

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Pursuant to Rule 16, paragraph 1 (c) of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment entered on October 21, 1957, by a three-judge district court convened pursuant to 28 U. S. C. 2284 and 2325, dismissing a complaint seeking to set aside two orders entered by the Interstate Commerce Commission in a proceeding under Section 1 (18) of the Interstate Commerce Act in which the Nashville, Chattanooga & St. Louis Railway (N. C. & St. L.) and the Western

and Atlantic Railroad Company (W. & A.) jointly applied for a certificate of public convenience and necessity authorizing them to construct and operate a track approximately 4.04 miles long in Hamilton County, Tennessee. The authorization was sought to enable the applicants to switch loaded and empty cars between their main line and the tracks of industries located in the Boyce area of the switching district of Chattanooga, Tennessee.

Most of the Boyce area is within an outward bend of the Tennessee River and formerly was subject to periodic overflow. After flood control dams constructed by the Tennessee Valley Authority had eliminated such flooding, the Southern Railway Company, through a subsidiary, purchased much of the land for industrial purposes, and it has acquired a total of 765 acres at a cost of $1,172,842. Prior to completion of the flood control project, only four or five small industries, which are served by the Southern over a track known as the river track, and built more than 50 years ago, operated in the area. Since 1952, four large new industrial plants have located in the area, those of the Quaker Oats Company, Central Soya Company, Cramet, Inc., and Heavy Minerals Company. (J. St. App. B–4–B–7.)

The applicant's main line passes along the southern boundary of the Boyce industrial area, and thence to Chattanooga, a distance of 5.5 miles, and parallels in this stretch the main line of the Southern. The track which they proposed to construct would cross the main line of the Southern by means of an overhead bridge. It would extend northwesterly for a distance

of about 1.75 miles, and then southwesterly about two miles farther to the plant of the Quaker Oats Company. It would cross at grade Southern's river track within the Boyce industrial area, as well as certain highways. (J. St. App. B–10, App. F.)

For a period of at least 35 years prior to June 23, 1954, the Boyce area was included in the Chattanooga switching area and all railroads entering Chattanooga had access to the industries in the area through reciprocal switching arrangements with the Southern. The Southern performed all the switching at a rate of $12.73 per loaded car, which was absorbed by the participating carriers (J. St. App. B–12). By a tariff publication on June 23, 1954, Southern removed the industries served by its river track in the northeasterly portion of the Boyce area from the Chattanooga switching district (*ibid.*).[1] Complaints were filed with the Commission requesting elimination of the provisions of Southern's tariffs withdrawing the Boyce area from the Chattanooga switching district, and the Commission entered an order requiring Southern to restore the prior reciprocal switching (J. St. App. B–13). In a suit by Southern to set aside the order, a three-judge district court upheld its validity (*Southern Railway Co.* v. *United States,* 154 F. Supp. 562 (E. D. Va.)), and this Court affirmed the district

[1] The purpose of this action was to enable Southern to receive, in lieu of the switching charge of $12.73 per loaded car, a division of about 20% of the total revenues on the line-haul traffic moved by the applicants and participating carriers between their yards in Chattanooga and points throughout the country, but the tariff publication did not increase the freight rates to shippers in the Boyce area (J. St. App. B–12–B–13).

court's judgment on January 13, 1958 (No. 579, this Term). 355 U. S. 370.

In the instant case, the State of Georgia intervened in support of the application filed by N. C. & St. L., and W. & A., and the Southern Railway Company and two of its subsidiaries intervened in opposition. Thereafter, the applicants and the State of Georgia filed a joint motion to dismiss the application upon the ground that the track proposed to be constructed was a "spur, industrial, team, switching or side" track located wholly within one state, which Section 1 (22) of the Act excludes from the Commission's jurisdiction under Section 1 (18).

The Commission, by Division 4, determined that the jurisdictional question raised by the motion to dismiss could not be resolved until after all relevant facts had been developed upon a hearing, and deferred consideration of the motion pending a full hearing. On September 4, 1956, Division 4 issued a report in which it found that it had jurisdiction of the application under Section 1 (18) of the Act, but that public convenience and necessity do not require the proposed construction (J. St. App. B–19–B–25). An order denying the application was accordingly entered on the same day (J. St. App. C–1), and the full Commission by its order of February 12, 1957 denied a petition for reconsideration (J. St. D–1–D–2).

ARGUMENT

1. Appellants contend that the proposed trackage is not an "extension" under the provisions of Section 1 (18) of the Interstate Commerce Act, but is a "spur"

or "industrial" track to be constructed within a single state, which is exempted by Section 1 (22) from the certificate requirements of Section 1 (18).

This Court in *Texas & Pacific Rwy. Co.* v. *Gulf, C. & S. F. Rwy. Co.*, 270 U. S. 266, enunciated clear and unmistakable standards for determining whether a proposed trackage is an "extension" of a line of railroad or a "spur" or "industrial" track. The Court there pointed out that Congress, under the Transportation Act of 1920, undertook to develop and maintain an adequate railway system, and thereby recognized that preservation of the earning capacity and conservation of the financial resources of individual carriers is of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources, the burden of which falls upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. 270 U. S. at 277.

The Court, construing the provisions of Sections 1 (18) and 1 (22) in the light of this Congressional policy, noted that the "spur, industrial, team, switching or side tracks" which are exempted from the requirements of Section 1 (18) by Section 1 (22), "are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier",

and that the construction of such tracks ordinarily involves only a small expenditure. *Id.* at 278. But there is, the Court said, an "extension" of a railroad within the meaning of Section 1 (18) if "the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, * * * although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks." *Ibid.*

The courts and the Commission have held that when an industry or industrial area is already served by one railroad, the construction of a track by another railroad to reach the same plant or area, under the circumstances present here, constitutes an invasion of territory and requires a certificate of public convenience and necessity. *Chicago, Milwaukee, St. P. & P. R. Co.* v. *Northern Pac. R. Co.*, 120 F. Supp. 710 (W. D. Wash.), affirmed 225 F. 2d. 840; *Union Pacific R. Co.* v. *Denver & Rio Grande Western R. Co.*, 198 F. 2d 854; *Chicago, B. & Q. R. Co. Construction*, 282 I. C. C. 539, 559 (1952); *Cleveland, C., C. & St. L. Ry. Co., Construction*, 267 I. C. C. 643, 646 (1947); *Pittsburgh C., C. & St. L. Ry. Co. Construction*, 244 I. C. C. 392 (1941); *Operation by L. A. & S. L. R. R.* 124 I. C. C. 207 (1927); and *Construction by Alabama, T. & N. R. Corp.*, 154 I. C. C. 308 (1929).

The track which the applicants sought to construct would be approximately 4.04 miles in length, first crossing three mainline tracks of Southern by means of an overhead bridge, and then crossing at grade other tracks of the Southern at least four times. The

estimated cost of the new track is $523,916.00 (Tr. 53; Exs. H–1, 5 and 6). Much of the land to be traversed was acquired by Southern for the industrial development of the area, and the track is designed to gain physical access to industries already located on the tracks of the Southern. Clearly, these and other factors are more than sufficient to support the Commission's conclusion that "the service accorded by the Southern to the industries in the Boyce area is adequate to meet all the reasonable traffic demands of those industries and under that circumstance, the proposed extension, costing over one-half million dollars, would be an expenditure of money not in furtherance of the national transportation policy, and would be inimical to the public interest" (J. St. App. B–25).

The district court held that the area which the appellants seek to reach is "new territory" to them because they are not now serving it in the sense in which the word "serve" was used in the *Texas and Pacific* case or in the sense in which the Southern is now serving it; that the proposed trackage represents a "*substantial* extension" because it involves substantial expenditures and runs a considerable distance; and that the building of the new tracks of significant mileage comes within the jurisdiction of the Comission when, as here, such construction involves substantial expenditure to duplicate existing adequate facilities, in order to tap an industrial area not presently reached by its own facilities (J. St. App. A–11).

2. Appellants contend (J. St. 26–29) that the district court's statement that the basic facts on which

the jurisdictional question turns "are supported by substantial evidence and are therefore not subject to review by this court" shows that the court fell short of its duty to review the Commission's determination of its own jurisdiction. But the court's acceptance of Commission findings for which there was substantial evidentiary support is not an abdication of its judicial duty to determine the legal significance of these facts with reference to the disputed jurisdictional issue. The court, in fact, gave extended consideration to both the factual and legal aspects of this issue (J. St. App. A-3–A-10). Moreover, appellants in the court below did not dispute, and they do not dispute in this Court, the "basic facts" relevant to the jurisdictional issue found by the Commission.

3. The Commission, in determining that the proposed track construction is not required by public convenience and necessity, found that under the existing circumstances the proposed expenditure would not be in furtherance of the national transportation policy and "would be inimical to the public interest" (J. St. 25). The court treated this finding as of some relevance to the question whether the proposed track would be an "extension" of the railroad's line or merely a "spur" or "industrial" track. Appellants do not contend that the court erred in regarding the finding of "inimical to the public interest" as relevant to the jurisdictional issue, but contend (J. St. 25–26) that the finding is unsupported by or contrary to the evidence.

In *Texas & New Orleans Railroad Company* v. *The Northside Belt Railway Company*, 276 U. S. 475, 479,

the Court said that the purpose of subsections 18 to 22 of Section 1 of the Act "is to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in the public interest." In the light of the purpose of the statute thus declared, we submit that there plainly was evidence to support the Commission's "inimical to the public interest" finding. There was evidence that Southern is presently furnishing, and is capable of furnishing all of the railroad service needed in the Boyce area (Tr. 303, 304); that construction of the proposed trackage, costing more than $500,000, would materially decrease Southern's revenues by diverting traffic which is now handles (Tr. 326–328); that the proposed track would complicate Southern's access to its own property and would require expensive cross-overs and create operational hazards (Tr. 266); that the Southern has acquired property in the Boyce area at a cost of nearly $1,175,000 for industrial development and has modernized its Citico yard, in the vicinity, at a cost of approximately $15,000,000 (Tr. 248–251); and that the proposed track would immeasurably lessen the value of Southern's holdings (Tr. 254).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below is correct and that the appeal presents no substantial question. The judgment of the district court should be affirmed.

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